Supreme Court, U.S.
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No. ____ 07-237

IN THE

Supreme Court of the United States

MIGUEL ANGEL CEBALLO, also known as Miguel Angel Ceballos,

Petitioner,

—v.—

ALBERTO R. GONZALES, Attorney General of the United States,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LINDA KENEPASKE
Counsel of Record
LAW OFFICES OF
LINDA KENEPASKE, PLLC
261 Fifth Avenue, Suite 2000
New York, New York 10016
(212) 986-5993

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Does the Court of Appeals have jurisdiction to review the use of a legally erroneous legal standard by the Immigration Judge and the Board of Immigration Appeals under 8 U.S. C. 1252(a)(2)(D)?

PARTIES TO THE PROCEEDING

Petitioner is Miguel Angel Ceballo, also known as Miguel Angel Ceballos. Respondent is Alberto Gonzales, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Miguel Angel Ceballo, also known as Miguel Angel Ceballos, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, filed in the proceedings on May 23, 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated May 23, 2007, denying Petitioner's petition for panel rehearing and a petition for rehearing en banc is not officially reported and is included in the Appendix at 1a-2a. The opinion of the United States Court of Appeals for the Second Circuit, dated May 23, 2006, dismissing Petitioner's Petition for Review is not officially reported, and is included in the Appendix at 3a-7a. The decision of the United States Court of Appeals for the Second Circuit, dated November 7, 2005, granting Respondent's motion to dismiss in part and denying the motion to dismiss in part, is not officially reported, and is included in the Appendix at 8a-9a. The decision of the Board of Immigration Appeals, dated May 13, 2004, is not reported and is included in the Appendix at 10a-12a. The decision of the Immigration Judge, dated October 30, 2002, is not reported, and is included in the Appendix at 13a-28a.

JURISDICTION

The opinion of the United States Court of Appeals constituting its judgment was filed on May 23, 2007. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. U.S. Constitution, Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. 8 U.S.C. 1182, repealed by Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provision so subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the discretion vested in him under section 211(b). This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B) (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for

which both predicate offenses are covered by section 241(a)(2)(A)(i)"

3. 8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

"Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

STATEMENT OF THE CASE

Petitioner, a thirty-one year old native and citizen of Colombia, has resided in the United States as a lawful permanent resident since 1987. He was placed under deportation proceedings by issuance of a Order to Show Cause on or about May 23, 1996, that alleged that he was deportable from the United States under 8 USC 1251(a)(2)(B)(i) (now found at 8 U.S.C. 1227(a)(2)(B)(i)) and 8 USC 1251(a)(2)(A)(iii) (now found at 8 U.S.C. 1227(a)(2)(A)(iii)) as a result of his conviction on August 22, 1995 for the offense of Attempted Criminal Sale of Cocaine in the Third Degree, in violation of New York Penal Law Section 110/220.39. He pled guilty to that offense and was sentenced to 90 days in prison and five years probation. At his deportation hearing in 1996, he applied for relief from removal under former 8 U.S.C. 1182(c). ("Section 212(c)") On October 23, 1996, the Immigration Judge ("IJ") pretermitted his application in reliance on Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 1104-132, 110 Stat. 1214, 1277

("AEDPA"), enacted on April 24, 1996, which eliminated relief under Section 212(c) for non-citizens convicted of a drug trafficking crime. Over the next five years Petitioner pursued appeals before the Board of Immigration Appeals ("BIA") and a petition of a writ of habeas corpus before Federal District Court. He argued that Section 440(d) of AEDPA should not be given retroactive effect, and that he should be eligible for relief under Section 212(c) of the Immigration and Nationality Act, as his conviction occurred before the enactment of Section 440(d) of AEDPA. On August 21, 2001, the BIA remanded Petitioner's proceedings back to the Immigration Court so that he might be heard on his application for 212(c) relief under the decision in *Pottinger v. Reno*, 242 F.3d 360 (December 18, 2000) and *INS v. Cyr*, 121 S. Ct., 2271 (2001) On October 30, 2002, after a full evidentiary hearing, the IJ denied the petitioner's application for 212(c) relief and ordered him deported to Colombia. Petitioner filed a timely appeal of the IJ's decision with the BIA. On May 13, 2004, the BIA upheld the IJ's decision and ordered Petitioner deported to Colombia.

Petitioner argued in his appeal to the BIA that the IJ's decision contained numerous errors of law and fact: that the IJ did not identify and properly weigh his equities; that the IJ, contrary to any legal authority, formulated a new improper standard for evaluating his equities; and that the IJ did not function as an impartial arbiter. The BIA dismissed Petitioner's appeal, finding that the IJ had noted that most of the rehabilitative efforts made by Petitioner had occurred after the institution of deportation proceedings. The BIA did not address Petitioner's contention that the IJ had improperly formulated and used a new standard to weigh the equities that was not supported by any case law, statute, or regulations. Petitioner filed a petition for review before this Court, in

which he argued that the IJ had not functioned as a objective and fair arbiter, thus depriving Petitioner of constitutional due process; that the BIA should have found that the IJ improperly formulated a new standard for the weighing of the equities, as it contradicted the precedents cited in the IJ's and the BIA's decision; and that the IJ's finding that the pet' ioner hadn't rehabilitated was contrary to the overwhelming evidence presented in the petitioner's case that he had done so.

In its motion to dismiss the Petition for Review, Respondent argued that the IJ and the BIA used the proper legal standard, and that the Court had no jurisdiction over the questions presented. This Court granted Respondent's motion in part and denied in part, leaving only one issue—whether the IJ applied the appropriate standard for balancing the equities. After reviewing the parties' memoranda of law and hearing oral arguments, the Honorable Judges Roger J. Miner, Richard C. Wesley, and Laura Taylor Swain issued a Summary order on May 23, 2006, in which they dismissed the petition for review, finding that the Court had no jurisdiction under 8 U.S.C. 1252(2)(B)(ii) to review the IJ's and the BIA's decisions, as the issue of whether the IJ had used an incorrect standard was neither a question of law nor a constitutional issue.

On July 7, 2006, Petitioner filed a Petition for Panel Rehearing and Suggestion for Rehearing en Banc with the U.S. Court of Appeals for the Second Circuit. The U.S. Court of Appeals for the Second Circuit issued a decision on May 23, 2007, denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully asserts that this case warrants the Court's attention because Petitioner has been deprived of Due Process by the Immigration Judge and the Board of Immigration Appeals, and the Court of Appeals in declining to review the Immigration Judge's and the Board of Immigration Appeals' decision has departed from its own holding in *Xiao Ji Chen v. U.S.*, 471 F.3d 315 (2nd Cir. 2006). Under the Court of Appeals for the Second Circuit's holding in *Xiao Ji Chen v. U.S.* the Court of Appeals' jurisdiction to review questions of law is not limited to issues of pure statutory construction. Petitioner's case presents a question of law that does not involve pure statutory construction, but instead, laws and standards set forth in years of precedents, cited by the Immigration Judge and the Board of Immigration Appeals in their respective decisions. The Immigration Judge and the Board of Immigrating Appeals did not follow such precedents, and departed from them without prior notice, explanation, or justification. As a result, Petitioner's right to due process in the immigration court was violated.

1. The IJ's formulation without prior notice to Petitioner of a new, unprecedented standard that did not follow any of the case precedents the IJ and the BIA cited in their respective decisions, is a question of law, as it is a legally erroneous standard. See *Xiao Ji Chen v. U.S.*, 471 F.3d 315 (2nd Cir. 2006). The standard used by the IJ directly conflicts with the spirit of this Court's holding in *INS v. St. Cyr*, 121 S. Ct. 2771 (2001), which did not freeze equities or negative factors in a case at the time of the original deportation proceedings. This is a question of law that the Court of Appeals may review under 8 U.S.C. 1252(a)(2)(D).

2. Petitioner was deprived of Constitutional Due Process. The IJ and the BIA did not follow their own long established case precedents in Petitioner's case, despite the fact that they cited those very precedents in their respective decisions. The IJ's formulation without any prior notice of a new, unprecedented standard that did not follow any of the case precedents he cited in his decision and was not supported by any statute, regulation or case law deprived Petitioner of Due Process. This is clearly a constitutional issue, which is reviewable in the Court of Appeals under 8 U.S.C. 1252(a)(2)(D).

ARGUMENT

This Court may review all questions of law, not just questions of pure statutory construction.

The U.S. Court of Appeals for the Second Circuit erred in restricting its jurisdiction to review the BIA's decision in this matter. Under the jurisdiction restoring provision of the REAL ID Act in 8 U.S.C. Section 1252(a)(2)(D), the Court of Appeals may review all questions of law, not just questions of pure statutory construction. The IJ and the BIA did not follow their own long established case precedents in Petitioner's case. This is an error of law that was reviewable by the U.S. Court of Appeals under a recent decision, discussed below.

In *Xiao Ji Chen v. U.S. Department of Justice*, 471 F.3d 315 (2nd Cir. 2006) ("*Chen II*"), the U.S. Court of Appeals for the Second Circuit revised its decision in *Xiao Ji Chen v. U.S. Department of Justice*, 434 F. 3d 144 (2nd Cir. 2006), ("*Chen I*") in which it had expressed the view that "questions of law," as the term is used in 8 U.S. C. Section 1252(a)(2)(D), codification of section 106(a)(1)(A)(iii) of the REAL ID Act of 2005

("REAL ID Act"), Pub. L. No. 109-13, 119 Stat. 231, 302, refers only to "narrow category of issues regarding statutory construction." In *Chen II*, the Court, instead of interpreting "questions of law" to mean only "matters of statutory construction," interpreted "questions of law" more broadly to "encompass the same types of issues that courts traditionally (reviewed) in habeas review over Executive detentions." (*Chen II*, 471 F. 3d at 326-27). The court stated:

> "To determine whether a reviewing court has jurisdiction under Section 106 to consider a petition for review, especially one challenging the agency's fact-finding or its exercise of discretion, the court would need to study the arguments asserted. The court would need to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual findings or justification for the discretionary choices, in which case the court would lack jurisdiction, or whether it instead raises a "constitutional claim" or "question of law," in which case the court could exercise jurisdiction to review those particular issues."

The Court goes on to say:

> "Such an issue would also arise where a discretionary decision is argued to be an abuse of discretion because it was made without rational justification or based on a legally erroneous standard."

Xiao Ji Chen v. U.S. 471 F.3d 315, at 329 (2nd Cir. 2006) (*Chen II*).

The Court of Appeals issued its second decision in *Chen II* after it denied Petitioner's Petition for Review

and before it denied Petitioner's Petition for Rehearing. There is no indication in its decision denying the Motion for Rehearing that it considered the effect of its own ruling in *Chen II* on Petitioner's petition for rehearing.

Petitioner has been asserting since he filed his appeal with the BIA in 2004 that the IJ employed a legally erroneous standard in deciding the merits of his case, one unsupported by statute, regulation, or case precedent. This is clearly within the purview of the Court of Appeals' decision in *Chen II*, in which the Court specifically stated that an issue that could raise a "constitutional claim" or a "question of law" could be "where a discretionary decision is argued to be an abuse of discretion because it was made without rational justification or based on a legally erroneous standard." *Xiao Ji Chen v. U.S.*, 471 F. 3d 315, at 329 (2nd Cir. 2006) (*Chen II*). The IJ's and the BIA's use of a standard that contradicts all precedents cited by both the IJ and the BIA and is unsupported by statute, regulation or case law is the type of "legally erroneous standard contemplated by the Court of Appeals in *Chen II*. In its decision the Court of Appeals points out that the court, especially in a decision challenging the agency's fact finding or exercise of discretion needs to study the arguments asserted. Petitioner respectfully contends that the Court of Appeals did not study the arguments he asserted, but, instead, denied his Petition for Review and for Rehearing, without using the reasoning it set forth in *Chen II*, as discussed above.

The issue of considering equities that have accrued over a long period of time after deportation proceedings have commenced is particularly important in view of the sheer numbers of 212(c) cases that began as long as ten or fifteen years ago and were not allowed to go forward for years because of the Attorney General's unconstitu-

tional determination that Section 440(d) of the of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L No. 104-132, 110 Stat. 1214 should be given retroactive effect. This Court found this interpretation to be unconstitutional in *INS v. St. Cyr*, 121 S. Ct. 2771 (2001). Significantly, neither the Supreme Court's decision in *St. Cyr* nor the *St. Cyr* regulations, found at 8 CFR 1003.44 contain any language referring to "cutting off" or "freezing" equities at any set time in the past, such as when the deportation proceedings were first commenced. Allowing the IJ and the BIA to disregard years of case precedents and to then negate or disregard equities that improved or accrued over the years the individual respondents were fighting against an unconstitutional interpretation, amounts to an unwarranted limitation of the Supreme Court's decision in *INS v. St. Cyr* and the *St. Cyr* regulations.

The Court of Appeals' reliance on its decision in *Avendano-Espejo v. Department of Homeland Security*, 448 F. 3d 503 (2nd Cir. 2006) is misplaced.

In its decision finding that it had no jurisdiction to review the IJ's and the BIA's decision, the Court relied on a previous case decided by the Second Circuit Court of Appeals on May 11, 2006, *Avendano-Espejo v. Department of Homeland Security* 448 F. 3d 503 (2nd Cir. 2006). In that case, Mr. Avendano, who had been placed under removal proceedings in 2002, applied for relief from removal under former INA Section 212(c). The IJ found that Mr. Avendano had failed to establish "unusual or outstanding equities" sufficient to overcome the "extremely adverse" circumstances involved in his case, namely his "repetitive criminal history," which included ten convictions in fifteen years for such offenses as criminal trespass, possession of stolen prop-

erty, harassment, operating a motor vehicle while impaired by alcoholics, disorderly conduct, criminal impersonation, and three convictions for driving while intoxicated. On appeal to the BIA, Mr. Avendano argued that the IJ had used "an excessive" and "erroneous legal standard" in requiring him to show "unusual or outstanding equities," thereby depriving him of his "due process right to a full and fair hearing." The Court found that Mr. Avendano had failed to raise any colorable constitutional claim or question of law sufficient to invoke their jurisdiction under the REAL ID Act, 8 USC 1252(a)(2)(D). The Court cited *Matter of Edwards*, 20 I&N Dec. 3134 (BIA 1990) and *Matter of Marin*, 16 I&N Dec. 581 (BIA 1976) as precedents that set forth the necessity of showing outstanding and unusual equities as the negative factors grow more serious. The Court found that the IJ was properly exercising his discretion, and that Mr. Avendano's claim was in the end a claim of "abuse of discretion," which it did not have jurisdiction to review.

Petitioner respectfully asserts that the Court's reliance on its decision in *Avendano-Espejo* is misplaced, as the question presented in his case is different from the question presented in Mr. Avendano's case. Mr. Avendano challenged the IJ's discretionary finding that the severity of his criminal record required him to demonstrate "outstanding and unusual equities", which is supported by all relevant case precedent, whereas Petitioner is challenging the IJ's formulation and use of an erroneous standard for negating or devaluing equities acquired over time, a standard which is not supported by case precedent, statute or regulation, and directly contradicts long established case precedent.

When Mr. Avendano entered the IJ's courtroom, he knew what to expect: the IJ would follow the relevant

case law that has served as precedent for 212(c) cases for more than twenty years: *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Buscemi*, 19 I&N Dec. 238 (BIA 1988); and *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990). The case law clearly states that as the negative factors grow more serious, it may be necessary for an applicant for 212(c) relief to demonstrate "outstanding and unusual equities", and Mr. Avendano, who had ten convictions over a fifteen year period, should have expected the IJ to require him to demonstrate unusual and outstanding equities. The IJ exercised his discretion properly, in accordance with the precedents cited above, in deciding whether or not Mr. Avendano was required to demonstrate unusual and outstanding equities, and whether he did so.

In Petitioner's case, the IJ found that he had established outstanding and unusual equities, but discounted not some, but all of the equities because they improved or occurred after he was placed in deportation proceedings. The IJ cited all three precedents mentioned above in his decision, and he did not cite any other precedents relevant to the issue of discretion in a 212(c) application. Likewise, the BIA cited only *Matter of Marin* and *Matter of Buscemi* and no other precedents relevant to the issue of discretion. The IJ and the BIA cited those decisions, because those cases have served as precedents for 212(c) cases for almost thirty years for *Marin*; almost twenty years for *Buscemi*, and more than fifteen years for *Edwards*. The IJ then went on to find that Petitioner had demonstrated outstanding and unusual equities in that he stated: "As far as the Court is concerned, the respondent may be considered to have unusual or outstanding equities." (Appendix, 27a). He went on to say:

> "On the other hand, the Court would note that the respondent's equities are noticeably stronger now than when the case began and that equities acquired while a deportation case is pending usually are considered to be somewhat less significant than those that existed before it began or before the criminal conviction occurred." (Appendix, 27a)

The IJ then concluded:

> "As far as the Court is concerned, even if the respondent is held to have "unusual and outstanding equities," it is not justified to grant this application as a matter of discretion for the doubt concerning actual rehabilitation as opposed to verbal or expressed rehabilitation by the respondent, **and** (emphasis added) the fact that so many of the equities came into existence in the last few years after the respondent had been ordered deported, at risk of deportation , and well aware of the possibility that he might be forced to leave the country." (Appendix, 27a)

The BIA did not disturb the IJ's decision and in response to Petitioner's argument that the IJ had applied an incorrect standard, noted only and inaccurately that the IJ had stated that "most of the rehabilitative efforts made by the respondent occurred after the institution of deportation proceedings in 1996." (Appendix, 11a)

The precedent cases cited above contain no suggestion whatsoever that equities that have been found to be "outstanding and unusual" should be given less weight or value because they became stronger or arose after deportation proceedings were commenced. In each long-standing precedent cited above, the BIA looked at the

respondent's equities as they existed at the time of the hearing, not as they existed at some point in the past. The BIA has even made a practice of remanding 212(c) case appeals pending for a long period of time before the BIA to the IJ so that the IJ can look at any new factors that may have arisen over time. This is the backdrop against which Petitioner's petition for review must be considered.

Instead of following the same precedents he and the BIA cited in their respective decisions, the IJ just made up a standard particular to this case. Although the Court of Appeals dismissed the part of Mr. Ceballos' petition for review that dealt with the IJ's bias against Mr. Ceballos and his witnesses, and his "doubts" that Mr. Ceballos had not rehabilitated despite overwhelming and incontrovertible evidence to the contrary, this Court should also consider these issues as part of the backdrop in Petitioner's case. Petitioner was aware that under case law and precedent, the IJ might require him to make a showing of "outstanding and unusual equities," and according to the IJ's decision, he was able to do so. What Petitioner didn't know when he went into his hearing, and what forms the basis of his argument that his rights to constitutional due process were violated by the IJ and the BIA, is that the IJ, without any prior notice to him, would invent a standard, unsupported by the statute, case precedent or regulations and would then use that standard to consider his equities. He did not know all of his equities would be eliminated, because they became better or occurred over time. There is no way he could have known the IJ would use such a standard, because under all relevant case law, the equities and negative factors in a 212(c) application were always taken as they were at the time of the hearing.

Petitioner concedes that the IJ has the right to exercise his discretion in deciding whether or not to grant him relief under Section 212(c) of the Act. The IJ's discretion, however, is not absolute and must be used in accordance with due process and fairness. The IJ's discretion does not extend to ignoring case precedent, and then formulating or inventing a new standard for weighing or essentially eliminating equities, one that unsupported by and, indeed, is in direct opposition to the very same precedents he cites in his decision. As pointed out above, the BIA chose not to even address this issue in its brief decision.

In its memoranda of law in opposition to Petitioner's Petition for Review, Respondent was unable to point to any precedent, statute, or regulation that support the IJ's finding that Ceballos' equities should be discounted because they "came into existence after (he) had been ordered deported, at risk of deportation, and well aware of the possibility that he might be forced to leave the country." It is also important to note that neither the Supreme Court's decision in *INS v. St. Cyr* or the recently issued *St. Cyr* regulations contains any mention of any such type of "stop time" analysis for 212(c) cases.

The IJ's standard in Petitioner's case actually was taken from case law that has developed around motions to reopen deportation/removal proceedings, filed by aliens in illegal status who, in many cases, had been ordered deported, absconded, and appeared later, asking that their deportation proceedings be reopened, as they had acquired significant equities warranting reopening of their proceedings. Respondent cited several of these cases in support of the argument that "after acquired" equities may be discounted. Of the cases cited, *Carruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) involves an alien in unlawful status who applied for asylum; *Wang v. INS*,

622 F. 2d 1341 (9th Cir. 1980), *rev'd on other grounds*, 450 U.S. 139 (1981) involves unlawful aliens who sought to reopen suspension of deportation proceedings; and *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980) involves an alien in unlawful status who was an applicant for suspension of deportation. In *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984), which may actually be the case the IJ was thinking of when he set forth his standard, the BIA dealt with an alien in unlawful status who had absconded from immigration authorities after his deportation order, and who then filed a motion to reopen his deportation proceedings, citing the births of his United States citizen children as equities. In the cases cited and discussed directly above, in which the Federal Court or the BIA declined to reverse, or reopen the IJ's or the BIA's decisions ordering the aliens deported, the decisions were all addressed to aliens who were neither lawful permanent residents or U.S. citizens; who were illegally in the United States; who had no immigration documentation; and were not in any way entitled to remain in the United States. All had gained equities in the United States, while they were in illegal status, and after they had been ordered deported.

The problem with using the "motion to reopen standard" for Petitioner's case is that it just doesn't apply to Petitioner's case. Petitioner did not gain his equities under the same circumstances as the aliens in the cases cited above. He has been in the United States in legal status since April, 1987, and was and is entitled to live in the United States as a lawful permanent resident during the pendency of deportation proceedings. He did not abscond or hide from the Immigration Service. Instead, he fought at great financial and emotional expense to himself for the right to be heard on his application for 212(c) relief, a right that was denied him for six years, because the Attorney General interpreted the changes

brought about by Section 440 (d) of the AEDPA in a manner found to be unconstitutional by the United States Supreme Court in *INS v. St. Cyr*, 121 S. Ct. 2771 (2001). He did not, as the aliens mentioned directly above, live in the United States in an illegal status, receive an order of deportation, and then ask to have his proceedings reopened because of equities that arose after his order of deportation. His proceedings were reopened and remanded because the Supreme Court found that the interpretation of Section 440(d) of AEDPA that the Immigration Service had been advancing was unconstitutional.

It is particularly discouraging that the IJ's decision discounting and negating Petitioner's equities should be allowed to stand, because the delays that allowed Petitioner's equities to strengthen over time were caused solely by the INS's improper interpretation of the law. In its decision in *INS v. St. Cyr*, 121 S. Ct. 2771 (2001), this Court found the INS's interpretation to be unconstitutionally retroactive. To penalize Petitioner for the fact that through no fault of his own, his proceedings went on for such a long time that his equities, most of which already existed at the time deportation proceedings were commenced against him, and to then use a standard to weigh his equities that is not applicable to his particular immigration status and application for relief is unconscionable. During the more than six years he was struggling to be heard on his application for relief, he had a right to continue to work, educate himself, form relationships, have children, support his family, and to rehabilitate himself. The fact that he has lived a very productive and responsible life during the pendency of his proceedings is a credit to him, and it should not be discounted because it occurred over time.

If Petitioner had been convicted of a crime, involved in any type of illegal activities or had failed to support his child, etc., during the time he was waiting his chance to be heard on his 212(c) application, Respondent would have been eager to point this out to the IJ, the BIA, and the Court, as a negative factor. Respondent most certainly would not have urged the Court to discount such "after acquired" negative factor.

All of the precedents cited by and relied upon by the IJ and BIA in their respective decisions regarding Petitioner's application for 212(c) relief, point to an analysis of the equities and negative factors at the time of a respondent's hearing, not at some artificially set time in the past. The IJ and the BIA erred in formulating without prior notice a new, restrictive standard for weighing the equities in Petitioner's case—a standard not supported by any precedent, statute or regulation, and, as discussed above, applicable in case precedents only to motions to reopen/reconsider. The IJ and the BIA did not apply the law correctly, as set forth in longstanding precedents. The BIA must follow its own precedents and regulations, and it is a violation of due process to not do so. See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991). The IJ "changed the rules" during Petitioner's hearing. Without any notice to Petitioner, he formulated and applied a new restrictive and erroneous standard that was unsupported by precedent, statute or regulation—a standard that was particularly onerous to respondents such as Petitioner, who were forced to fight for years for the right to even apply for 212(c) relief.

Deportation implicates "issues basic to human liberty and happiness."

A decision regarding deportation is extremely serious. Indeed, this Court has recognized deportation implicates "issues basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) When a lawful permanent resident is involved, deportation is the equivalent of banishment or exile. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947). Petitioner may be banished for life from the United States and his family because of the IJ's legal error and the BIA's failure to correct the error and restore Petitioner's right to due process, if this Court agrees that the Court of Appeals has no jurisdiction to review the IJ's and the BIA's decision and allows them to stand without review. Petitioner respectfully requests that this Court in making its decision, consider the fact that the Petitioner will be forever banished from the United States if the IJ's and the BIA's flawed and unconstitutional decisions are allowed to stand without review. What the IJ did was wrong as a matter of law, and it violated Petitioner's right to due process. Petitioner is not asking this Court to reweigh the equities, as Respondent suggests. Instead, he is asking the United States Supreme Court to find that the Court of Appeals has jurisdiction to review the IJ's invention and use of an erroneous legal standard for the consideration and weighing of his equities, an IJ's standard that case precedent has reserved for motions to reopen/reconsider and one that is simply not supported by any case law, statute, or regulation, and, indeed, did not follow the case law the IJ himself and the BIA cited in their decisions.

CONCLUSION

For all the reasons set forth above, this Court should issue a writ of certiorari to review the important questions presented in this petition and, following such review, to reverse the decision below.

Dated: August 17, 2007

Respectfully submitted,

LINDA KENEPASKE
Counsel of Record
LAW OFFICES OF
LINDA KENEPASKE, PLLC
261 Fifth Avenue, Suite 2000
New York, New York 10016
(212) 986-5993

Counsel for Petitioner

APPENDIX

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

Thomas Asreen
ACTING CLERK

Date: 5/23/07
Docket 04-3231-ag
Short Title: Ceballo v. Ashcroft
Agency
Number: A41-077-612
Agency: Immigration & Naturalization Service

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of May, two thousand seven.

Docket No 04-3231-ag
Filed May 23, 2007

MIGUEL ANGEL CEBALLO, also known as Miguel Angel Ceballos,

Petitioner,

—v.—

JOHN ASHCROFT, Attorney General of the United States,

Respondent.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Miguel Angel Ceballo, also known as Miguel Angel Ceballos. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: /s/ ARTHUR HELLER
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER
Filed May 23, 2006

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 23rd day of May, two thousand and six.

Present: HON. ROGER J. MINER,
HON. RICHARD C. WESLEY,
Circuit Judges,
HON. LAURA TAYLOR SWAIN,
District Judge.[1]

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[1] The Honorable Laura Taylor Swain, United States District Court for the Southern District of New York, sitting by designation.

(04-3231-ag)

MIGUEL ANGEL CEBALLO, also known as Miguel Angel Ceballos,

Petitioner,

—v.—

ALBERTO R. GONZALES, Attorney General of the United States,[2]

Respondent.

Appearing for Petitioner:

LINDA KENEPASKE, New York, New York.

Appearing for Respondent:

ANASTASIA ENOS KING, Assistant United States Attorney (Kevin. J. O'Connor, United States Attorney for the District of Connecticut, *on the brief*; Sandra S. Glover, Assistant United States Attorney, *of counsel*), Hartford, Connecticut.

Petition for review of a decision of the Board of Immigration Appeals ("BIA") issued on May 13, 2004, affirming a denial by the immigration judge ("IJ") of petitioner's application for relief under section 212(c) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1182.

[2] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is substituted for former Attorney General John Ashcroft as respondent in this case.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED; ADJUDGED, AND DECREED that the petition for review is **DISMISSED**.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. Petitioner, who seeks a waiver of deportation (now designated a "waiver of removal") under INA § 212(c), contends that the IJ erred in balancing the equities of his waiver application. In an earlier order, a panel of this Court granted in part and denied in part respondent's motion to dismiss for lack of jurisdiction. *See Ceballo v. Gonzales*, No. 04-3231-ag, Order of November 7, 2005 ("Order"). We held that "this court lacks jurisdiction to review the IJ's ultimate discretionary decision denying relief." *Id.* (citing *Kalkouli v. Ashcroft*, 282 F.3d 202, 203 (2d Cir. 2002)). But we denied the government's motion "with respect to the issues relating to whether the IJ applied the appropriate standard for balancing the equities." *Id.* We ordered respondent to submit an appellate brief regarding the remaining issues, and respondent complied with our request.

Subsequently, however, a panel of this Court held that "an IJ's decision to grant or deny a section 212(c) waiver of removal constitutes a discretionary decision that we lack jurisdiction to review under 8 U.S.C. § 1252(a)(2)(B)(ii)." *Avendano-Espejo v. Dep't of Homeland Security*, No. 03-40921-ag, __ WL __, __ F.3d __ (2d Cir. May 11, 2006) (per curiam). In *Avendano-Espejo*, we pointed out that, " 'absent a specific issue of statutory construction, the term "questions of law" in 8 U.S.C. § 1252(a)(2)(D) does not provide our Court with jurisdiction to review a petitioner's challenge to a decision firmly committed by statute to the discretion of the

Attorney General.' " *Id.* at __ (quoting *Bugayong v. INS*, 442 F.3d 67, 72 (2d Cir. 2006)). We also noted that a "petitioner's attempt to 'dress up' his challenge with the language of 'due process' is insufficient to provide our Court with jurisdiction to review his claim, inasmuch as petitioner's argument that the IJ employed an 'erroneous legal standard' in adjudicating his request for section 212(c) relief . . . amounts on this record to nothing more than a challenge to the IJ's exercise of his discretion," which, "as this and other courts have held consistently, fall[s] outside the jurisdiction-restoring provisions of the REAL ID Act" *Id.* at __.

We hold that our decision in *Avendano-Espejo* controls the remaining jurisdictional issue in the instant case. Petitioner contends that, in balancing the equities of his application for waiver of deportation under INS § 212(c), the IJ erred in discounting certain equities acquired after he had been ordered deported. As *Avendano-Espejo* indicates, however, such a decision by the IJ is precisely the type of discretionary decision that we lack jurisdiction to review under 8 U.S.C. § 1252(a)(2)(B)(ii). *See Avendano-Espejo*, __ F.3d at __. Moreover, petitioner's attempt to characterize his challenge as a due process claim or a challenge to an erroneous legal standard is, as *Avendano-Espejo* explains, similarly unavailing. *See id.* at __.

Accordingly, for the reasons set forth above, the petition for review is hereby **DISMISSED**.

For the Court
Roseann B. MacKechnie, Clerk

/s/ LUCILLE CARR
By:

A TRUE COPY
Thomas Asreen, Acting Clerk
by /s/ [illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

04-3231-ag
Filed November 7, 2005

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 7th day of November, two thousand and five.

Present:

HON., JOHN M. WALKER, JR.,
Chief Judge,
HON., WILFRED FEINBERG,
HON., RICHARD J. CARDAMONE,
Circuit Judges.

MIGUEL ANGEL CEBALLO, also known as
Miguel Angel Ceballos,
Petitioner,

—v.—

ALBERTO GONZALES, Attorney General
of the United States,
Respondent.

The respondent moves to dismiss for lack of jurisdiction the petitioner's petition for review of the Board of Immigration Appeals ("BIA") decision denying his application for a waiver of deportation under § 212(c) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1182(c) (repealed in 1996). Upon due consideration, it is ORDERED that the motion is GRANTED with respect to petitioner's claims that the immigration judge ("IJ") was biased and the BIA improperly summarily affirmed the IJ's decision on the alternative ground that those claims are meritless. Although this court has jurisdiction to review those constitutional claims, the petitioner has not demonstrated bias on the IJ's part, and the BIA's summary affirmance was proper under the present circumstances. *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). Additionally, this court lacks jurisdiction to review the IJ's ultimate discretionary decision denying relief. *See Kalkouli v. Ashcroft*, 282 F.3d 202, 203 (2d Cir. 2002). However, it is further ORDERED that the motion is DENIED with respect to the issues relating to whether the IJ applied the appropriate standard for balancing the equities, and the respondent is ordered to submit an appellate brief regarding the remaining issues within 30 days of the filing of this order.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: /s/ LUCILLE CARR
Deputy Clerk

[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]

File: A41 077 612 - New York

Date: May 13, 2004

In re: MIGUEL ANGEL CEBALLO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Linda Kenepaske, Esquire

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. This matter was last before the Board when we remanded the record to afford the respondent the opportunity to apply for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent's appeal of the Immigration Judge's October 30, 2002, decision denying his application for a waiver of inadmissibility is dismissed.

Upon review, we find that the Immigration Judge's denial of relief under former section 212(c) of the Act is adequately supported by the record and will affirm his

decision to the extent that the Immigration Judge found that the respondent did not warrant the favorable exercise of discretion (I.J. at 27-46). *See Matter of Burbano*, 20 I&N Dec. 872, 974 (BIA 1994) (noting that the adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The Immigration Judge found that the respondent did not merit favorable discretion in this case, taking into account the positive and negative equitable aspects of the respondent's application. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). *See also Matter of Buscemi*, 19 I&N Dec. 628, 633-34 (BIA 1988) (holding that "unusual or outstanding equities must be demonstrated because of either a single serious crime or because of a succession of criminal acts"). Contrary to the respondent's assertions on appeal, the record clearly reveals that the Immigration Judge gave serious consideration to his equities, including his long-term residency in the United States, the presence of his United States child and other relatives in the United States, his employment history in the United States and his financial contribution to his family (I.J. Dec. at 11-15).

Moreover, when considering the important issue of rehabilitation, the Immigration Judge noted the serious nature of the circumstances surrounding the respondent's 1995 conviction for a controlled substance offense and that most of the rehabilitative efforts made by the respondent have occurred after the institution of deportation proceedings in 1996 (I.J. Dec. at 7-8; 18-19). The Immigration Judge also observed that the respondent's testimony appeared to minimize the behavior which lead to his conviction for the attempted sale of cocaine (I.J. Dec. at 16). Upon comparison with the objective evi-

dence of record relating to the respondent's 1996 conviction, we agree with the Immigration Judge's conclusion that the respondent's testimony regarding his participation in this crime was less than straightforward. *Id.*

While the ultimate discretionary ruling by the Immigration Judge is subject to a de novo standard of review, the factual determinations made by the Immigration Judge in the course of reaching his final finding are given more deference. *Compare* 8 C.F.R. § 1003.1(d)(3)(ii) *with* 8 C.F.R. § 1003.1(d)(3)(i) (2004). We find no clear error in the various factual conclusions reached by the Immigration Judge, and in light of those factual determinations, affirm the Immigration Judge's ruling that the respondent does not merit the favorable exercise of discretion. *See Matter of Buscemi, supra,* at 633 (pointing out that "[s]ection 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether an applicant merits the relief sought, and the alien bears the burden of demonstrating that . . . he merits relief") (internal citation omitted).

Accordingly, the appeal is dismissed.

/s/ FREDERICK D. HESS
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York, New York

File A 41 077 612 October 30, 2002

In the Matter of

MIGUEL ANGEL CEBALLO,
Respondent

IN DEPORTATION PROCEEDINGS

CHARGES: Section 241(a)(2)(3)(i) of the Immigration Act - an alien convicted of a crime involving a controlled substance; Section 241(a)(2)(A)(iii) of the Immigration Act - an alien convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

APPLICATIONS: Waiver of excludability and deportability under Section 212(c) of the Immigration Act.

ON BEHALF OF RESPONDENT:

ON BEHALF OF SERVICE:

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 27 year old man who's a native and citizen of Colombia, who entered the United States in April 1987. The respondent was placed in deportation proceedings through the Order to Show Cause issued May 23, 1996, which is Exhibit 1 in this case.

The Order to Show Cause states the two charges referenced above. These have been established as true. Based on the evidence referred to in the decision of Immigration Judge Duck at Oakdale, Louisiana, these findings were not actually challenged on the original appeal of the respondent's case and the respondent's deportability was sustained by the Board of Immigration Appeals more or less in passing in its decision issued July 2, 1997 which dealt mainly with the availability of any type of relief.

Due to litigation in Federal Courts the respondent is now considered eligible to apply for relief. The original interpretation by the Attorney General in the *Soriano* case was set aside by the higher courts. Specifically, in this case there was an order remanding the case for further administrative-consideration from the Eastern District of New York relying on the *Pottinger* decision and the case was then remanded by the Board of Immigration Appeals to this Court based on that order and also under the authority of *INS v. St. Cyr* which is similar in nature to the theory of the *Pottinger* decision.

The respondent's application for relief under Section 212(c) is Exhibit 4 in the record. The respondent's lawful admission as a lawful permanent resident was alleged by the Service in the Order to Show Cause and has never actually been in question. The respondent is also required to show that he has been lawfully domiciled in the United States for seven years. This is established in part by his testimony and to some extent by documents although the documentary evidence as to the respondent's presence in the U.S. in the early 1990s is somewhat sketchy, there's no reported income during that period. The respondent was more or less attending school but there are no real school records. There is a period of time apparently about seven months when the

respondent returned to Colombia at the request or at the instance of his mother to spend time with his father. The record doesn't actually establish the exact dates when he left or came back but there's no reason to doubt that it was approximately seven or eight months.

The other requirement for success in a 212(c) case is that the respondent show he deserves the relief as a matter of discretion and in certain cases the Board of Immigration Appeals holds that unusual or outstanding equities must be established. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Buscemi*, 19 I&N Dec. 628 (1988).

The Court does believe that the respondent is required to show what the Board calls unusual and outstanding equities. The respondent's conviction, as alleged in the Order to Show Cause and admitted by him, is for attempted sale of a controlled substance, cocaine in the third degree under New York law. The Court believes that the conviction itself and the circumstances of the conviction, which would indicate that the respondent sold drugs for profit or for remuneration on a number of occasions and that the drug sold, cocaine, is a drug which tends to be quite dangerous to the users and the people in the community would be sufficient to put the case within the requirements for unusual or outstanding equities. This is not a case where the respondent had merely a one or two time involvement as a marginal figure in the sale of controlled substances, so I believe the Board would require this higher standard of unusual or outstanding equities.

To meet this burden the respondent has presented his own testimony, testimony of his fiancee who is the mother of their child, testimony of his mother, and a proffer of testimony from the respondent's sister which

is similar in nature to the testimony offered by the mother in particular.

As far as the credibility of these witnesses, as far as the respondent's testimony concerning his current facts, his situation so to speak in terms of employment, family situation, etc., the testimony generally matches what documents are available. The documents appear to be reliable and there's no particular question as to the credibility of those factual statements. As far as the respondent's criminal record, the Court doesn't believe that the respondent has been really forthcoming or as accurate as possible in reference to his criminal record and the Court will discuss that a little further.

As far as the other witnesses, concerning the respondent's criminal activities in the past I believe his fiancee apparently has no direct knowledge. As far as the respondent's mother, it would seem either that she never quite understood what the respondent's criminal involvement was or that she is doing her best to forget it. The mother's testimony in particular has been extremely vague on this subject, she's made general statements indicating that everything was fine. For example, while the respondent was in school, when asked whether the respondent was ever forced to leave school she then recalls that he was arrested for some reason and given what she calls a reprimand. She doesn't remember that he had to go to court for anything relating to school, although the respondent says he was arrested, had to go to court, and actually convicted of a minor trespassing offense for which he received a year's probation. So the mother's testimony in terms of the respondent's background in general seems to be hazy at best.

As far as the credibility of the respondent's mother and his fiancee and to a certain extent the respondent himself concerning what might be considered positive

equitable factors, they have given a picture of the respondent which is strongly positive. He's a very good father to his young child, he's an affectionate boyfriend, he's a good son, he supports everyone in the household, etc. As far as the Court is concerned it seems that part of this might almost be a conscious attempt by these witnesses to present the most helpful picture possible. For example, the witnesses would speak of the respondent as paying essentially all the expenses and themselves contributing a little bit to certain marginal items. To a certain extent it is true that the respondent earns more than his mother and his fiancee and there's no particular information that the sister is earning anything at this time, but it also seems that the witnesses have made the respondent's financial contribution seem more significant or proportionately greater than they probably are since it would seem that each adult in the household is contributing something to the expenses of the household. Also, as mentioned, the respondent's mother seemed to have a very selective memory about her son's problems in the past. She said he was always living with her when he was young, although the respondent himself recalls living with his grandparents and visiting his mother on the weekends even though they were living in the same city. The respondent's mother has mentioned, says the respondent had no problems in school but when asked specifically she can remember there was some vague problem. The respondent's fiancee indicates that although he works full-time and in fact according to his testimony he also works overtime she believes, she testified that he actually spends more time with their daughter than she does although she works at most 20 hours a week. This type of testimony taken altogether gives the Court the impression that the female relatives in particular are trying to make the respondent appear

particularly indispensable to the household. He may in fact be a major figure in the household, he may spend a lot of time with his daughter, it's difficult for the Court to tell what the true situation is because the picture presented seems to be out of touch with reality. Furthermore, I would note that it seems as though everyone in the household except the respondent is developing some kind of health problem which makes the respondent's presence in the household even more significant to the extent that we heard testimony about the respondent's fiancee's other daughter, which he is not the father of, possibly needing some surgery for tonsil problems. The Court believes that such problems are relatively rare at the present time and the tonsil problems are usually treated by antibiotics. The original testimony was that the young child needed an operation and then when asked the testimony was that she was being evaluated and might need an operation. This is an example of what the Court thought was a fairly persistent exaggeration or shading of the actual facts to try to make the picture look particularly helpful to the respondent.

As far as the respondent's conviction, the respondent was convicted for attempted sale of cocaine. It's plain from the pre-sentence investigation and to some extent the respondent's own testimony that this was the result of the respondent selling cocaine in a bodega or small neighborhood grocery store over a period of approximately three months, possibly as long as March to late July. The respondent was selling small quantities, that is to say for retail use so to speak by drug users, not the type that might be resold to other people according to his own testimony, which is consistent on this point with the pre-sentence investigation. The respondent says that he was doing this in exchange for a type of salary, that he was paid about $250 a week for working three days a

week, six hours a day selling drugs in this bodega. It wasn't clear to the Court originally that the respondent was doing anything else but as the respondent explained it further he seemed to indicate that he was essentially a sales clerk in the bodega or running the bodega at the cash register during his shift and that he sold cocaine as part of this arrangement.

The Court believes that the sale of cocaine on a regular basis in the period in question, the mid-90s in New York City was conduct that could only be engaged in by a person who would consciously disregard or not care about the negative effects that cocaine had already had on New York City since the 1980s. This was the subject of widespread public discussion, newspaper headlines, etc., and a person would have to be deliberately blind not to realize by '94 or '95 that cocaine was having a devastating affect on many neighborhoods in the city as well as the people who were using it. In this regard, the respondent testified originally on direct that he only sold drugs about 20 times by his estimate but the Court believes that this is clearly not correct and I doubt that the respondent ever believed that this was a truthful answer. If the respondent worked, as he testified, he would have worked at least 36 shifts at the bodega and it's difficult to believe that anyone would keep him there selling drugs if an entire shift might go by where he sold no drugs at all. Furthermore, the respondent's testimony about how he only sold to people he recognized, as frequent buyers in other words, seems to the Court to be inconsistent with the idea that they were a relatively small number of sales because in a small neighborhood grocery store if you had only sold drugs 20 times you would hardly begin to have much in the way of a repeat business. Furthermore, as far as the Court is concerned, the very nature of cocaine sold in these small quantities

for individual use is consistent with the idea that the users most likely were buying the drug on a fairly regular basis whether they could be considered technically addicted to the drug or not. So as far as the Court is concerned the respondent is downplaying the seriousness of the criminal offense and downplaying the extent of his involvement. As far as the Court is concerned there is no particular reason to think that the respondent's testimony about his conduct which led to the conviction is necessarily true in any respect. Parts of it are consistent with the pre-sentence investigation as far as the respondent's selling inside a building. As far as the Court is concerned otherwise there's no particular reason to think that the respondent was paid a salary, there is no particular reason to think that the respondent was actually selling goods at the bodega, or that the bodega was doing any substantial business in anything except illegal drugs.

As far as other negative factors, the respondent does not have any prior record with the Immigration Service before this Order to Show Cause was issued. The respondent did receive unemployment from the Government while selling drugs. The pre-sentence investigation indicates about $80 every two weeks as I understand it. The respondent today seemed to indicate $80 a week but most likely the pre-sentence investigation is more accurate on this point. The respondent's arrest at his school for what was eventually a trespass adjudication as a youthful offender is first of all a very minor offense under New York law and second of all, not technically a "conviction" for immigration purposes under the Board's interpretation. As far as the Court is concerned, a person who "trespassed" on school property would not be something that was worth consideration as a negative factor. The Court is concerned about two aspects of this case.

One is the respondent received a term of one year probation which I believe to be an unusual sentence for a young person who was found to have committed the crime of trespass. It's difficult to believe that the New York courts would think it was worthwhile to impose such a sentence on a high school student because, as the respondent claims, he and some friends went to play handball in a part of the school premises which had been roped off or marked by signs as a place where no one should go because there was construction going on there. As far as the Court is concerned, the mother's statement that the respondent received a reprimand would be about what we would expect for this type of behavior. The respondent has indicated that his attendance record before this time was poor and that he had some other disciplinary problems and theoretically this might explain why he would be arrested for playing handball on the wrong part of the school property, but the Court still believes that it would be extremely unusual for the court in a criminal case to actually impose a sentence of a year's probation for this behavior. And the Court really doubts that this is the extent of what occurred and notes that apparently, according to the respondent, two of the people involved were not even from his school.

As far as the mother's testimony, it's unclear that the mother actually understands anything that her son did while he was a teenager. But, to the extent that she understands, she says that this problem was for entering the school without permission. She doesn't seem to have any idea that it involved going on a handball court or anything of that nature. The second reason why the Court notes this trespass matter as a negative factor is that the respondent was on probation in that case up to just about the time he started selling drugs, if not actually past the beginning of the time he started selling

drugs. So there's not much to show that the respondent learned anything from the experience of being on probation.

As far as positive factors, the respondent has been a resident of the U.S. for 15 years, since the age of about 11 1/2. He apparently was not in the U.S. before that time. The respondent is not married but he does live with his girlfriend or fiancee and both testified that they were considering marriage and probably would get married if the respondent was successful in this deportation case. It appears they've lived together for about two years. The couple has a child who was born in the U.S. and is now about 18 months old. The child lives with the two parents, the respondent and his girlfriend. The respondent also has his mother, who's a naturalized U.S. citizen. She came to the U.S. as a resident at the same time he did in April 1987. The respondent says he's not aware of where his father is, that his father might be in Colombia or some other country. Apparently, the father was only in the U.S. for a relatively short time after the family immigrated, although he may have been here working for some time before the family immigrated. The respondent has a sister who's in her early 20s, is attending a local college. The Court has always heard of this as being a community college, perhaps it's a four year program. The sister apparently worked before and presumably could work part-time or full-time. At the present time it would seem she's being supported by the respondent and to some extent by her mother in terms of the expenses at the apartment, which she shares with the other people. The respondent's fiancee has another child now approximately 5 years old, this child lives with the couple. As far as the Court is concerned it is not a significant relationship in the sense that there's no legal duty by the respondent to this child and it began a rela-

tively short time ago. The respondent's fiancee probably could earn more if she was not supported in part by the respondent and presumably as she indicated might be able to collect child support if she made the effort to do so from the father of this older child. She has not done so according to her partly because the respondent is helping her financially.

As mentioned earlier, the picture of the witnesses is that the respondent is essentially supporting almost everyone in the household almost completely. The respondent did earn $35,000 in 2001 which certainly is more than the other people earned assuming that the sister didn't have any income during that year.

As far as the affect of deportation on the respondent's fiancee, it seems to the Court that there would certainly be some emotional hardship to her. There might be some financial hardship to her in the long run. It's hard to say since she's young and presumably starting her working career, and there would probably be substantial hardship to the daughter that the respondent and the fiancee have in common. The hardship to the daughter would include being deprived of the presence of her father, especially when she's young and growing up. This might be considered somewhat less significant in the sense that the daughter hasn't had a long time with her father such as six or seven years to grow accustomed to her father to clearly identify him as her father, to understand the significance of that, etc. But still it seems to the Court there would be substantial hardship, economically and presumably emotional as well for this daughter.

As far as the respondent, it seems to the Court that there would be substantial adjustment problems for the respondent to move back to Colombia where conditions certainly are poorer economically than in the United States and where the country is suffering from a number

of problems of somewhat chaotic government situation, prevalent violence, etc. The respondent, I believe, also could be expected to suffer significant emotional hardship if he's forced to leave the U.S. since it seems likely to me that none of the respondent's close relatives would accompany him and it seems unlikely that any of them would visit him more than at most occasionally for short times.

As far as hardship to the mother, I certainly believe there would be some emotional hardship to the respondent's mother and likewise I would presume to his sister. However, I would note that the mother seems to be somewhat disconnected from reality in regard to the respondent's past activities. As mentioned earlier she doesn't seem to remember him living separately from her for a period of time, she seems to downplay the respondent's own testimony that she sent him to Colombia because she feared he was getting in trouble with bad friends. She eventually admitted that was an element of it but otherwise she downplayed that. And as far as the Court is concerned, it's difficult to say whether the mother will suffer a great deal of emotional hardship or not because of this rather peculiar situation where her memory of his past problems seems to have been blanked out.

As far as the respondent's present activities, he's employed for about two years in a steady unionized job which offers him reasonable income plus good benefits. The union which he belongs to is well known in the city as having numerous benefit programs for its employees and being reasonably aggressive in terms of trying to represent the employees rights in most situations.

The respondent doesn't appear to have any property in the United States nor is there any evidence of community involvement outside the family unit.

The respondent spent two months in the city jail on a sentence of three months in jail plus five years probation. It's normal for a person to serve two months on a sentence of up to three months since he gets credit for good behavior while in city jail.

The respondent completed his second term of probation apparently without incident. The pre-sentence investigation indicates the respondent did not do well on his first term of probation but it's not actually clear what this means, whether he simply failed to attend one required interview or whether he was out of compliance for a lengthy period. That probation terminated by the expiration of the term before the respondent was arrested for the criminal offense which is mentioned in the Order to Show Cause.

The evidence of rehabilitation for the respondent at the present time includes that he is working, he is supporting his relatives and he indicates that he's sorry for his past behavior. On the other side of the picture is that the respondent seems to be minimizing his actual behavior which led to the conviction. The Court has discussed this previously but I would point out that the pre-sentence investigation actually details six specific sales of cocaine by the respondent on various dates when he was being observed by undercover officers or selling drugs to undercover officers and that the estimate of 20 sales seems to be a gross minimization of the respondent's drug dealing.

As far as the rehabilitation, also the Court is concerned to a minor degree but still would mention again the unconvincing explanation of what led to the respondent's problems at school.

As far as the evidence, in summary it seems to the Court that the respondent has not been a resident of the United States for an unusually lengthy period of time.

He has been a resident for 15 years which is twice the minimum that Congress required to apply for 212(c) relief but he had only been a resident for about eight years before he committed the crime and about nine years before the Order to Show Cause was issued. Frankly, if the respondent had had a merits hearing on his 212(c) application when the case was originally before Judge Duck the amount of time the respondent had spent in the U.S. would have been noticeably brief. The respondent was not exceptionally young at the time he entered the United States but certainly he spent more than half his life here and this may be considered a significant factor. The conditions in Colombia, which were mentioned by several witnesses, would probably make the respondent's deportation to his home country more serious in terms of its affects on him than a person facing deportation, for example, to the Dominican Republic, a country where there's a fair amount of poverty and problems in finding employment but not quite so much problems in terms of prevalent violence, etc. The Court would note that all the witnesses referred to the problems in Colombia but managed to leave out the bad affects of drug dealing which used to be considered a major problem in Colombia before everyone started mentioning guerrilla warfare.

As far as the respondent's ties to his family, it seems to the Court that the more significant ties for the present case are the ties to the respondent's fiancee and their young daughter. I don't mean to downplay the significance of the respondent's relationship to his mother but her testimony was so vague and disorganized on this point in terms of actual facts that it's difficult to believe that they're closely in tough with each, etc., even though they've been living together for much of his time in the U.S.

As far as the Court is concerned, the respondent may be considered to have unusual or outstanding equities. The fact that he has a young U.S. citizen child and that he's by far the main support of that child is certainly a significant factor. Such a factor was not present in the *Marin* decision or the *Buscemi* decision which the Court cited earlier. In other cases such as *Matter of Edward*, 20 I&N Dec. 191 (1990), the respondent in that case had several U.S. citizen children including one with a serious illness and this certainly is a significant factor. The Court actually believes that a spouse and a young dependent U.S. citizen child are normally the strongest types of relatives in cases of this type because in such relationships the respondent facing the risk of deportation is usually the key relative in the life of the other person, or at least one of the two. That is to say for the infant child there's no substitute father in the picture and the respondent is one of the two significant relatives for that child.

On the other hand, the Court would note that the respondent's equities are noticeably stronger now than when the case began and that equities acquired while a deportation case is pending usually are considered to be somewhat less significant than those that existed before it began or before the criminal conviction occurred. The Court is concerned, as indicated in this decision, by the suggestion that the testimony of the witness has been shaded or tailored to a certain extent to make the respondent look more significant in the household than he might be and the corresponding problems with the respondent's testimony about the criminal conviction.

As far as the Court is concerned, even if the respondent is held to have "unusual and outstanding equities" it is not justified to grant this application as a matter of discretion for the doubt concerning actual rehabilitation as opposed to verbal or expressed rehabilitation by the

respondent and the fact that so many of the equities came into existence in the last few years after the respondent had been ordered deported, at risk of deportation, and well aware of the possibility that he might be forced to leave the country.

ORDER

IT IS THEREFORE ORDERED, that the application is hereby denied.

IT IS FURTHER ORDERED, that the respondent be deported from the United States to Colombia on both charges in the Order to Show Cause.

ALAN VOMACKA
Immigration Judge

No. 07-237

In the Supreme Court of the United States

MIGUEL ANGEL CEBALLO, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JENNIFER LEVINGS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for a discretionary waiver of removal under 8 U.S.C. 1182(c) (1994).

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In the Supreme Court of the United States

No. 07-237

MIGUEL ANGEL CEBALLO, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is not published in the Federal Reporter but it is available in 184 Fed. Appx. 28. The opinions of the Board of Immigration Appeals (Pet. App. 10a-12a) and the immigration judge (Pet. App. 13a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2006. A petition for rehearing was denied on May 23, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994), a

permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581, 583-585 (B.I.A. 1978). When considering a Section 212(c) application, an immigration judge (IJ) "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Id.* at 584.

In 1996, Congress repealed 8 U.S.C. 1182(c) (1994), and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304, 110 Stat. 3009-597. Relief under former Section 212(c) nonetheless remains available for certain aliens, such as petitioner, whose convictions were obtained through a plea agreement prior to the enactment of IIRIRA and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

2. Since 1996, the INA has barred federal-court review of certain decisions made by the Attorney General in immigration cases. See IIRIRA § 306, 110 Stat. 3009-607. As pertinent here, the INA provides:

> [N]o court shall have jurisdiction to review * * * any * * * decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or

> the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii).[1]

In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 (8 U.S.C. 1252(a)(2)(D) (Supp. V 2005)).

3. Petitioner is a native and citizen of Colombia who entered the United States in 1987. Pet. App. 13a. Over a period of approximately three months, petitioner sold cocaine to customers of a local bodega in New York City. *Id.* at 18a. During that time, petitioner "work[ed] three days a week, six hours a day, selling drugs in th[e] bodega." *Id.* at 18a-19a. In August 1995, petitioner was convicted in state court of attempted criminal sale of cocaine in the third degree, in violation of N.Y. Penal Law § 110 (McKinney 1998) and § 220.39 (2000). Pet. 3. He was sentenced to 90 days of imprisonment and five years of probation. *Ibid.*

The Immigration and Naturalization Service initiated removal proceedings, charging petitioner with

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[1] The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151-1378. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

removability based on his conviction for a controlled substance offense, which is an aggravated felony. Pet. App. 10a, 13a; see 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i).[2] Petitioner did not challenge removability, but he sought a discretionary waiver of removal under former Section 212(c). Pet. App. 10a, 14a. The IJ found petitioner removable as charged. *Id.* at 14a. The Board of Immigration Appeals (BIA) affirmed the IJ's finding of removability and held that petitioner was statutorily ineligible for Section 212(c) relief. A.R. 401. After a federal district court determined that petitioner was eligible to apply for a Section 212(c) waiver, the BIA remanded petitioner's case to permit him to seek that relief. *Id.* at 399.

4. On remand, the IJ denied petitioner's application for a Section 212(c) waiver. Pet. App. 13a-28a. Applying the BIA's precedent in *In re Marin*, 16 I. & N. Dec. 581 (B.I.A. 1978), and *In re Buscemi*, 19 I. & N. Dec. 628 (B.I.A. 1988), the IJ found that petitioner met the seven-year domicile requirement for a Section 212(c) waiver, but he concluded that petitioner did not satisfy his burden of demonstrating that his application warranted a favorable exercise of discretion. Pet. App. 14a-15a.

The IJ performed a lengthy analysis of the positive and negative equities surrounding petitioner's application. He noted several positive equities in petitioner's case, such as the fact that his fiancee and child are United States citizens; that his fiancee, child, mother, and sister depend on him for financial and emotional support; that petitioner has a steady job; and that peti-

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[2] Petitioner was charged with being removable under 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i). Pet. App. 10a. Those provisions have since been renumbered 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i). IIRIRA § 305(a)(2), 110 Stat. 3009-598.

tioner would likely face "substantial adjustment problems" if removed to Colombia after spending over a decade in the United States. Pet. App. 15a-27a. The IJ determined that those positive equities "may be considered * * * unusual or outstanding equities." *Id.* at 27a.

On the other hand, the IJ also noted numerous negative equities, including that petitioner had starting selling cocaine just after finishing a term of probation for a trespassing offense; that petitioner had exhibited a "conscious disregard[]" about the negative effects of cocaine; and that petitioner "downplay[ed] the seriousness of the offense and * * * the extent of his involvement." Pet. App. 19a-21a, 25a-26a. Moreover, the IJ "doubt[ed]" that petitioner actually had been rehabilitated, because his family members' testimony "had been shaded or tailored" to exaggerate the positive equities, and "so many of the equities came into existence * * * after [petitioner] had been ordered deported." *Id.* at 27a-28a. After weighing all of those factors, the IJ denied petitioner's application for a Section 212(c) waiver. *Ibid.*

5. The BIA affirmed after reviewing the IJ's determination that petitioner did not warrant a favorable exercise of discretion *de novo*. Pet. App. 10a-12a. The BIA observed that the IJ had applied settled BIA precedent regarding when a Section 212(c) waiver is warranted, "taking into account both the positive and negative equitable aspects of petitioner's application." *Id.* at 11a (citing *In re Marin* and *In re Buscemi*). The BIA determined that the IJ "gave serious consideration to [petitioner's] equities, including his long-term residency in the United States, the presence of his United States child and other relatives in the United States, his em-

ployment history in the United States and his financial contribution to his family." *Ibid.* Further, the BIA noted several negative factors, including the "serious nature of the circumstances surrounding [petitioner's] 1995 conviction"; the fact that "most of [petitioner's] rehabilitative efforts * * * have occurred after the institution of deportation proceedings"; and the fact that petitioner attempted to minimize his crime and testified about his crime in a "less than straightforward" manner. *Id.* at 11a-12a. In light of all of those factors, the BIA agreed with the IJ that petitioner did not merit a favorable exercise of discretion. *Id.* at 12a.

6. The court of appeals denied petitioner's petition for review in two separate decisions. Pet. App. 3a-7a, 8a-9a. In its initial decision, the court of appeals held, *inter alia*, that it "lack[ed] jurisdiction to review the IJ's ultimate discretionary decision denying relief" under former Section 212(c). *Id.* at 9a. The court then requested further briefing regarding "whether the IJ applied the appropriate standard for balancing the equities." *Ibid.*

In its second decision, the court of appeals determined that it lacked jurisdiction to review petitioner's claim that the IJ applied an incorrect legal standard because it was nothing more than an argument "that the IJ erred in balancing the equities of his waiver application." Pet. App. 5a. The court explained that "an IJ's decision to grant or deny a section 212(c) waiver of removal constitutes a discretionary decision" that it "lack[s] jurisdiction to review under 8 U.S.C. § 1252(a)(2)(B)(ii)." *Ibid.* (quoting *Avendano-Espejo* v. *Department of Homeland Sec.*, 448 F.3d 503, 505-506 (2d Cir. 2006)). The court also noted that petitioner's claim that the IJ erred "in balancing the equities" and "in dis-

counting certain equities acquired after [petitioner] had been ordered deported" does not raise a constitutional question or question of law under 8 U.S.C. 1252(a)(2)(D). *Id.* at 6a. Instead, the BIA's and IJ's determination that the equities do not justify a Section 212(c) waiver "is precisely the type of discretionary decision that [the court of appeals] lack[s] jurisdiction to review." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred in finding that it had no jurisdiction to review his claim that the BIA erred in denying him a discretionary Section 212(c) waiver. The decision below is correct, and it does not conflict with any decision of this Court or any other court of appeals. The decision below is also unpublished and non-precedential. Further review is therefore unwarranted.

1 a. The court of appeals correctly found that it lacked jurisdiction to review petitioner's claim that his situation merited a discretionary Section 212(c) waiver. First, the court of appeals correctly held that 8 U.S.C. 1252(a)(2)(B)(ii) bars petitioner's claim because the BIA's decision to grant or deny a Section 212(c) waiver is a quintessentially discretionary determination. Former Section 212(c) states that qualified aliens "may be admitted in the discretion of the Attorney General," 8 U.S.C. 1182(c) (1994), and no statute or regulatory provision limits that discretion. As the BIA has explained, "Section 212(c) * * * does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is required to determine as a matter of discretion whether the alien merits the relief sought, and the alien bears the burden of demonstrating that his

application warrants favorable consideration." *In re Edwards*, 20 I. & N. Dec. 191, 194-195 (B.I.A. 1990). A Section 212(c) waiver determination is thus a "decision or action * * * the authority for which is * * * in the discretion of the Attorney General," over which judicial review is precluded by 8 U.S.C. 1252(a)(2)(B)(ii). Petitioner does not challenge that aspect of the court of appeals' decision. Pet. 15.[3]

Second, the court of appeals correctly found that petitioner's claim does not fall within the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Petitioner's claim is that the IJ and BIA "erred in balancing the equities of his waiver application." Pet. App. 5a. As petitioner recognizes (Pet. 15), a Section 212(c) waiver is discretionary, and whether an alien has met his burden that a waiver is justified depends on the facts of his particular case. *In re Marin*, 16 I. & N. Dec. at 584-585. Here, there was no serious dispute about the applicable legal standards; as both the IJ and BIA recognized, settled legal precedent directs the weighing of positive and

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[3] Judicial review of petitioner's claim is also barred under a separate provision, 8 U.S.C. 1252(a)(2)(C). Section 1252(a)(2)(C) states:

> [N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title.

Petitioner was charged as removable because he committed a controlled substance offense that is also an aggravated felony. See 8 U.S.C. 1227(a)(2)(A)(iii) and (B)(i). Although the court below did not rely on Section 1252(a)(2)(C), that provision provides yet another indication that Congress intended to preclude judicial review in a case like this one. See, *e.g.*, *Labbe* v. *Attorney Gen.*, No. 05-5372, 2007 WL 2745713, at *2 (3d Cir. Sept. 21, 2007).

negative equities to determine whether a Section 212(c) waiver is justified in a given case. Pet. App. 11a, 15a. Petitioner's disagreement with the IJ's and BIA's application of settled precedent to the facts of his case does not raise a "constitutional question" or "question of law." Indeed, petitioner's claim is nothing more than a challenge to the BIA's exercise of its broad discretion, and "challenges to the exercise of routine discretion * * * do not raise 'constitutional claims or questions of law.'" *De La Vega* v. *Gonzales*, 436 F.3d 141, 146 (2d Cir. 2006); see Pet. App. 5a-6a.

b. Petitioner claims that he has raised a "constitutional claim[] or question[] of law" by alleging that "the IJ employed a legally erroneous standard" by "discounting * * * petitioner's equities * * * [that] improved or occurred after he was placed in deportation proceedings," and that new legal standard "deprived [him] of Due Process." Pet. 5-6, 9, 11-18. Petitioner's attempt to recast his disagreement with the IJ's and BIA's fact-bound determination as a constitutional or legal question is unavailing, because petitioner cannot present a colorable constitutional claim or question of law.

As the court of appeals recognized, petitioner's argument on appeal was that "the IJ erred in balancing the equities of his waiver application." Pet. App. 5a. That is "precisely the type of discretionary decision" that Congress has entrusted to the Attorney General and over which Congress has precluded judicial review under 8 U.S.C. 1252(a)(2). *Id.* at 6a. Indeed, if petitioner's challenge to the BIA's exercise of its statutorily conferred discretion were considered a "constitutional claim[] or question[] of law" under Section 1252(a)(2)(D), that phrase would lose all meaning. See, *e.g.*, *Higuit* v.

Gonzales, 433 F.3d 417, 420 (4th Cir.), cert. denied, 126 S. Ct. 2973 (2006) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."). Review is also unwarranted because even if the court of appeals had jurisdiction to review petitioner's claim, the result in this case would be the same, because neither the IJ nor the BIA adopted a new legal rule for evaluating Section 212(c) waiver applications.

Petitioner has no colorable claim that either the IJ or the BIA adopted a new, incorrect legal standard. The IJ did not hold that equities that arise after deportation proceedings commence are irrelevant to a Section 212(c) determination. Rather, he noted that in petitioner's particular case, he doubted petitioner's rehabilitation because petitioner attempted to minimize his crime, was not forthcoming with the court, and appeared to take steps toward rehabilitation only after he had been ordered deported. Pet. App. 27a-28a. The IJ did not purport to adopt a new legal standard, and, as petitioner acknowledges (Pet. 12), he cited the longstanding precedent that everyone agreed framed the inquiry in this case. Pet. App. 15a.[4]

In any event, the BIA performed a *de novo* review of the IJ's ultimate discretionary determination (Pet. App. 10a-12a), and the court of appeals' review was limited to the BIA's decision. See *Belortaja* v. *Gonzales*, 484 F.3d 619, 263 (2d Cir. 2007). Regardless of whether the IJ

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[4] Petitioner hypothesizes (Pet. 16) that the IJ "may actually [have] be[en] * * * thinking of" other legal standards and precedents than those he cited when making his Section 212(c) determination, but there is simply no support in the IJ's opinion for that conjecture.

adopted a new legal rule, the BIA clearly did not hold that petitioner's equities should be "'cut[] off' or 'fr[ozen]' * * * at any set time in the past." Pet. 10. Instead, the BIA considered all of petitioner's equities, including his rehabilitative efforts, his long-term residency, his child and other relatives in the United States, his employment history, his financial contributions to his family, the nature of his crime, and his attempt to minimize his criminal behavior. Pet. App. 11a-12a. Although the BIA gave less weight to rehabilitative efforts that commenced after the institution of deportation proceedings in petitioner's particular case, it applied settled BIA precedent and did not adopt any new rules of law. *Ibid.* The court of appeals thus correctly found that petitioner raised no colorable question of law.

Moreover, "petitioner's attempt to 'dress up' his challenge with the language of 'due process'" is insufficient to establish federal court jurisdiction over his claim. *Avendano-Espejo* v. *Department of Homeland Sec.*, 448 F.3d 503, 505-506 (2d Cir. 2006). As an initial matter, "aliens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection." *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004). And again, petitioner's invocation of the Due Process Clause does not change the nature of his claim, which "amounts on this record to nothing more than a challenge to the IJ's exercise of his discretion." Pet. App. 6a (internal quotation marks omitted). As the Third Circuit recently explained, the federal courts of appeals "are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim" in determining whether a claim is reviewable under Section 1252(a)(2), because "[t]o do otherwise would elevate form over sub-

stance and would put a premium on artful labeling." *Jarbough* v. *Attorney Gen.*, 483 F.3d 184, 189 (3d Cir. 2007).

c. Petitioner has not alleged any disagreement in the federal courts of appeals regarding whether Section 1252(a)(2) authorizes judicial review of a discretionary denial of a Section 212(c) waiver application. To the contrary, several courts of appeals have recognized that a denial of discretionary relief such as a waiver or cancellation of removal or adjustment of status is not reviewable, even when the alien attempts to recast his challenge as legal or constitutional in nature. See, *e.g.*, *Benyamina* v. *Garcia*, 204 Fed. Appx. 622, 625 (9th Cir. 2006) ("A petitioner may not create jurisdiction to review an exercise of section 212(c) discretion by characterizing the exercise as a due process violation."); *Elysee* v. *Gonzales*, 437 F.3d 221, 223-224 (1st Cir. 2006) (because the alien's claim merely "attack[ed] * * * the factual findings made and the balancing of factors engaged in by the IJ," it "d[id] not raise even a colorable constitutional claim or question of law"); *Higuit*, 433 F.3d at 420 (finding no jurisdiction to review alien's claim that the IJ erred in "balanc[ing] [the alien's] positive and negative attributes" because it was "an equitable determination based on factual findings rather than a question of law"). Thus, even if the court of appeals had arguably erred in finding that it had no jurisdiction over petitioner's claim, this Court should deny the petition because petitioner has failed to demonstrate any legal disagreement in the lower courts or any other "compelling reason[]" justifying certiorari review. Sup. Ct. R. 10.

2. a. Petitioner argues (Pet. 7-18) that this Court should grant review because the court of appeals misap-

plied two of its decisions. As an initial matter, those alleged conflicts provide no basis for this Court to grant review, because it is not the Court's task to reconcile intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); Sup. Ct. R. 10. If a conflict existed, it should be left for the Second Circuit to resolve.

In any event, the court of appeals' decision does not conflict with either of the decisions cited by petitioner. First, petitioner contends (Pet. 7-10) that the court of appeals misapplied its decision in *Chen* v. *United States Department of Justice*, 471 F.3d 315 (2d Cir. 2006). In *Chen*, the court of appeals explained that Section 1252(a)(2)(D) "deprive[s] [it] of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding or the wisdom of his exercise of discretion and raises neither a constitutional claim nor a question of law." *Id.* at 329-330. The court further explained, "[t]o determine whether a reviewing court has jurisdiction, * * * [t]he court would need to determine, regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual findings or justification for the discretionary choices, in which case the court would lack jurisdiction, or whether it instead raises a 'constitutional claim' or 'question of law.'" *Ibid.* That is precisely what the court of appeals did in this case. It determined that the essence of petitioner's claim is that the IJ and BIA erred in balancing the equities, which is a challenge to a dis-

cretionary determination that is beyond review. Pet. App. 5a-6a.[5]

b. Petitioner is likewise mistaken in arguing (Pet. 10) that the court of appeals misapplied its decision in *Avendano-Espejo* v. *Department of Homeland Security*, 448 F.3d 503 (2d Cir. 2006). In petitioner's view, that case is inapposite because there, the IJ applied settled law, while here, the IJ "formulat[ed] and use[d] an erroneous standard." Pet. 11. As explained above, the IJ did not formulate a new legal standard in this case. See p. 10, *supra*. And, as the court of appeals correctly recognized, *Avendano-Espejo* was highly relevant because the alien there, like petitioner, disagreed with the IJ's balancing of the equities and attempted to manufacture federal-court jurisdiction by claiming "that the IJ applied an excessive and erroneous legal standard * * *, thereby depriving [the alien] of his due process right to a full and fair hearing." 448 F.3d at 505 (internal quotation marks omitted). The decision below is thus consistent with *Avendano-Espejo*.

3. Finally, petitioner contends (Pet. 6, 10) that the court of appeals' decision "conflicts with the spirit of" *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, this Court held, *inter alia*, that Section 212(c) relief is available for aliens "whose convictions were obtained through plea agreements and who, notwithstanding

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[5] Petitioner also claims (Pet. 8) that the court of appeals incorrectly limited the phrase "questions of law" to "mean only 'matters of statutory construction,'" but the opinion below makes clear that the court did no such thing. As explained, the court of appeals' determination that it lacked jurisdiction over his appeal was based not on petitioner's failure to present a specific issue of statutory construction, but on his failure to present any colorable constitutional claim or question of law. Pet. App. 5a-6a.

those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 314-326. There is no dispute regarding whether Section 212(c) relief is available in this case, and the court of appeals' holding thus presents no conflict with *St. Cyr*.

Petitioner claims (Pet. 10) that the court of appeals' affirmance of the BIA's decision to "cut[] off" or "freez[e]" the equities at the time petitioner's removal proceedings commenced is inconsistent with *St. Cyr*. That contention is mistaken, both because the BIA and IJ did not adopt the legal rule petitioner claims, see pp. 10-11, *supra*, and because *St. Cyr* addressed an alien's statutory eligibility for Section 212(c) relief, not how the Attorney General was to balance the equities involved once an alien was determined to be eligible for such relief. *St. Cyr*, 533 U.S. at 314. Further review of petitioner's claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JENNIFER LEVINGS
Attorneys

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